26180

United States Supreme Court,

OCTOBER TERM, 1899.

No. ———.

CITY OF NEW ORLEANS—A MUNICIPAL CORPORATION,

PETITIONER,

versus

JOHN G. WARNER, ET ALS.,

RESPONDENTS.

Now comes the respondents in the above entitled proceeding, and for answer to the petition of the City of New Orleans praying for a writ of *certiorari*, say:

I.

That the statement of the proceedings had in the suit of John G. Warner, *et als., versus* The City of New Orleans, in the Circuit Court of the United States for the Eastern District of Louisiana, and in the United States Circuit Court of Appeals, as set forth in said petition, is substantially true, save and except that the said petitioner has omitted to state the fact that the appeal of the city from the said decree of the Circuit Court in favor of these respondents, dated March 26, 1900, was al-

lowed, and taken to the said Court of Appeals, *without a supersedeas,* as appears from the order of the Circuit Court granting said appeal (present record, p. 68); the said city of New Orleans having given bond for costs only, but without any stipulation securing the amount of said decree, as required by law, to suspend execution. And so respondents submit that if a writ of *certiorari* is granted herein, it should be expressly provided that the granting of the writ shall not operate to suspend or delay the execution of the said decree of March 26, 1900, unless the said petitioner shall give security for the principal and interest due respondents under said decree, now amounting to the sum of, say $791,000.

II.

These respondents deny that the master erred in allowing the claims of the holders of the warrants issued under the agreement of sale and compromise made between the City of New Orleans and the Mexican Gulf Ship Island Canal Company and Warner Van Norden, transferee, all of said warrants being of the same kind and class, and issued upon the same consideration as those held by John G. Warner, complainant, in the original suit; and they deny that the Circuit Court erred in overruling the exceptions to the master's report and in making the decree of March 26, 1900, or that the United States Circuit Court of Appeals erred in affirming said decree. And respondents specially aver that in allowing the claims of the warrant holders, the master strictly followed, as it was his duty to do, the requirements of the decree of December 5, 1898, as affirmed by this Honorable Court in the case of the City of New Orleans vs. John G. Warner, 175 U. S., 120; 176 U. S., p. 92.

III.

Respondents further submit that the City of New Orleans having been fully heard upon all the numerous defenses set up in its answer to the original bill of the said Warner, filed in behalf of himself and your respondents, holding the same class of warrants, should not now be permitted to set up other and

26181

further defenses before the master, impeacing the decree of December 5, 1898, affirmed by this Court, under which the master proceeded. Respondents are advised, in this connection, that neither the Master, nor the Circuit Court, nor the Court of Appeals, could lawfully disregard the decision of this Court, and deny to warrant holders the right to claim the benefit of said decree. And they further suggest that, according to settled practice and usage, this Court will not itself review, reverse, or modify its own decrees upon a second appeal.

Wherefore respondents pray that the application of the petitioner, the City of New Orleans, for a writ of *certiorari* be denied, with costs; but that in case this Honorable Court is pleased to allow said writ, it be expressly ordered that the allowance shall not suspend the execution of the decree sought to be reviewed, unless the petitioner shall give security for the amount due respondents thereunder, in principal and interest, now amounting to $791,000.

Respectfully submitted,

R. DEGRAY,
J. D. ROUSE,
WM. GRANT,
Solicitors for Respondents.

William Grant, being duly sworn, says that he is one of the solicitors for the respondents in this cause, and that the statements contained in the foregoing answer are true, to his own knowledge.

WM. GRANT.

Subscribed and sworn to before me this.....day of May, 1900.

.....,
Notary Public.

Brief in Support of the Foregoing Answer.

I.

Repeating briefly the statement of facts made in the case of the City of New Orleans vs. John G. Warner, 175 U. S., 120, it appears that by a solemn agreement executed before G. LeGardeur, notary, on the 7th day of June, 1876, the City of New Orleans purchased from the Mexican Gulf Ship Island Canal Company, and Warner Van Norden, its transferee, the plant and franchises of the Canal Company, and by the same act compromised certain claims held by Van Norden for damages, and for misappropriation of certain drainage taxes. Under this agreement the city acquired the property and franchises of the Canal Company, and its transferee, and obtained a discharge of their claim for damages; and Van Norden, transferee of the Canal Company, received warrants payable out of drainage assessments to the amount of $320,000 in discharge of the consideration. These warrants were for various sums, and were numbered from 393 to 402 inclusive. John G. Warner brought suit on this agreement as holder of three of these warrants, numbered respectively 379, 380, 381, for $2,000 each. The bill was brought by the complainant in his own interest, and in behalf of all other holders of the warrants issued in discharge of the consideration of the agreement. It was dismissed by the Circuit Court on demurer, but the decree of dismissal was subsequently reversed by the Circuit Court of Appeals upon the advice of this Honorable Court, given in Warner vs. New Orleans, 167 U. S., 467. The city then answered the bill, and upon the merits the Circuit Court again dismissed the bill, but its decree was reversed by the Court of Appeals, which directed the Circuit Court to enter a decree in the following form:

"This cause came on to be heard on the transcript of the record in the Circuit Court of the United States for the Eastern District of Louisiana, and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this Court that the decree of said Circuit Court

in this cause be, and the same is hereby, reversed, and this cause remanded to said Circuit Court with instructions to enter a decree as follows, to-wit:

1. It is decreed that the City of New Orleans is a debtor to John G. Warner, complainant, in the sum of $6,000, with 8 per cent. interest thereon from June 6, 1876, as stipulated in the warrants sued on, and that he is entitled to be paid said sum in principal and interest out of the drainage assessments set forth in the bill filed herein.

2. The said drainage assessments, including those against the defendant, as assessee of the streets, squares, and other public places, as well as those against the owners of private property, be, and the same are hereby, declared to constitute a trust fund in the hands of the City of New Orleans for the purpose of paying the claims of complainant and other holders of the same class of warrants issued under the act of sale from Warner Van Norden, transferee, to said city under authority of Act No. 16 of the Legislature of the State of Louisiana, approved February 24, 1876.

3. That it be referred to one of the masters of the Court to take and state an account of all said drainage assessments, and for that purpose he is authorized to require the production before him of the assessment rolls and other records appertaining to such drainage assessments by any person having possession thereof, and to examine witnesses touching all such matters.

In taking and stating said account, the master is directed to charge the defendant as well with the amount of drainage assessments against the city on the areas of the streets, squares, and public places, as with those against the owners of private property with interest thereon as prescribed by law, and to give credit only for the sums already collected and properly expended by the defendant in the execution of the trust, but that no offset be allowed for the bonds issued in exchange for drainage warrants under the act of 1872.

It is further ordered that said master give thirty days' notice, by advertisement in a newspaper published in the City of New Orleans, to all holders of warrants issued as aforesaid, to appear before him and establish their claims.

And it is further ordered that said warrant holders be entitled to establish their claims before the master in the first instance, without being required to file formal interventions, or

to obtain special leave of the Court, and that they be entitled, upon making satisfactory proof, to the full benefit of the proceeding.

5. It is further decreed that upon the coming in of the master's report, and its confirmation, the complainant and all those who have established their claims under the fourth clause of the decree will be entitled to an absolute decree against the defendant for the amounts found due them, if the fund established by the accounting shall be sufficient, but if not sufficient to pay such claims in full, then for the proper pro rata thereof, and shall be entitled to have execution therefor.

It is further ordered that the complainant and all other parties in interest have leave to apply to the Court for such other and further orders as may be necessary, from time to time, to carry this decree into full effect, and that the defendant pay all costs of this suit.

It is further decreed that the defendant, the City of New Orleans, be condemned to pay the costs of this cause in this Court, for which execution may be issued out of said Circuit Court."

This decree of the Circuit Court of Appeals was reviewed by this court upon a writ of *certiorari*, and affirmed in New Orleans vs. Warner, 175 U. S., 120; 176 U. S., p. 92. Under this decree, thus affirmed, the holders of the warrants of the same kind and class as those owned by Warner, issued in discharge of the consideration of the said agreement, filed their claims with the master.

The master allowed all the warrants so presented, and made due report of his findings, to which exceptions were filed by the City of New Orleans. These expections admitted that the city was indebted for warrants issued in payment of the price of the tangible property purchased under the agreement, amounting to $153,750, but alleged that the balance of the warrants issued in payment of the compromise for damages and misappropriation of drainage taxes, and for the franchises of the Canal Company, amounting to $146,250, were void because the city was not authorized by the act of February 24, 1876, to issue warrants for those purposes. The master overrruled the exceptions, holding that the above decree of December 5, 1898, was

final and conclusive, both as to Warner and the other warrant-holders who had come in and accepted the benefit of the proceeding; and also holding that if it were an open question the said act of 1876 sufficiently authorized the city to purchase the franchises and to compromise the claims for damages, etc. The rulings of the master were sustained by the Circuit Court and by the Court of Appeals.

This Court is now asked to review these rulings of the master. Although the assignments of errror are numerous, the substantial question to be considered is whether the master erred in following the decree of reference which this Court has affirmed in its late decision.

The brief of the present petitioner in support of its former petition for *certiorari*, on page 6 thereof, contained the following remarkable agrument and promise, which becomes still more noticeable in veiw of the present application and is demonstrative of the value of its good faith, viz:—

> "The case, in its public aspect, is a subject of large and important interest to the inhabitants of one of the largest cities of the Union, and its final determination is awaited with anxiety by many thousands of persons who will be subject to its effects; and it is hoped that this court will see the way clear for the exercise of its supervisory jurisdiction invoked by defendant. The petitioner is the more earnest in this hope by its knowledge, that the final determination by this Court of a controversy which has been pending for many years, will be respected and cheerfully acquiesced in, by reason of the respect for, and confidence reposed in this tribunal by all good citizens."

The application now made shows how "cheerfully" the city has fulfilled its promise to "acquiesce" in the decision of this Court.

II.

We submit that the decree of the Circuit Court of December 5, 1898, copied in the foregoing statement, which this Court affirmed in the case of New Orleans vs. Warner, 175 U. S., 120, and 176, p. 92, was a decree not only in favor of John G. War-

ner, adjudging the validity of the agreement, and of all the warrants issued under it, as a unit, but was a decree also in favor of the holders of all warrants of the same class in whose behalf the bill was brought. Decrees in cases of this character are generally treated as decrees in favor of all creditors who come in and claim the benefit of them. So the Courts of Chancery, both in this country and in England, where several creditors' bills are pending against the same debtor, will allow the case in which a decree is first rendered to proceed, and enjoin others. Says the Court in Hammond vs. Hammond, 2 Bland (Md.), 362. "The principle upon which an injunction rests in such cases is that, substantially, a bill by a creditor in behalf of himself and all others, or a suit by any one, in which all the creditors may be represented, and allowed to come in to obtain satisfaction, is considered as making all of them parties to it, and that the decree is in the nature of a judgment for them all."

Brooks vs. Gibbons, 4 Paige, 374.

Thompson vs. Brown, 4 Johns, ch. 619.

We admit that the claims of creditors submitted to the master in cases of this character may be inquired into, but the inquiry, we submit, must me limited to special defences not affecting the claim of the complaining creditor, and to defences such as payment, etc., not covered by the decree. In the present case Warner's bill was brought to enforce the provisions of the agreement, in favor of himself and all the holders of warrants issued in discharge of its consideration. The city in its answer made numerous defences, one being that the agreement was a fraud on the city, and therefore void, but it did not pretend to deny its authority to make the agreement and issue the compromise warrants, under the Act of February 24, 1876. The Circuit Court of Appeals rendered a decree against the city on all its defences, maintaining the validity of the agreement and of the warrants held by Warner, issued under it. It authorized all holders of the same class of warrants issued under the same agreement to make proof of their claims before the

master, and upon making proof of their claims decreed that they be entitled to the full benefit of the proceeding, and further decreed that all those who had established their claims should be entitled to absolute judgments against the city for the amount of the warrants held by them. This is the decree which this Court affirmed in New Orleans vs. Warner, 175 U. S., 120, and which the master obeyed to the letter in hearing the reference. In such cases the settled rule is that where a master, on a reference, has followed the order of the judgment and pursuant to its directions, no objections can be taken on appeal to what he has done, when the appeal arises, as it does here, upon exceptions to his report.

New Orleans vs. Gaines, 15 Wall, 624.

The order under which the master acts is the law of the case, and so long as it remains in force he can commit no error in following it. The remedy of a party dissatisfied with the order of reference is to apply to the Court to have it modified or set aside. In the present case, however, the Circuit Court was without jurisdiction or power to set aside or change the decretal order of reference for any purpose, because the decree had been affirmed by this Court in New Orleans vs. Warner, 175 U. S., 120. Indeed, according to the course of practice, this Court would not then have modified the decree if application had beeen made to it, either directly, or by a second appeal, for it is a well settled and long established rule that whatever has beeen decided by an Appelate Court, cannot in the same suit and in the same Appelate Court be re-examined.

Chaffin vs. Taylor, 116 U. S., 567.

Supervisors vs. Kennecott, 94 U. S., 498.

III.

But suppose we are mistaken, and that the matter of the issue of said drainage warrants is still open for inquiry, then we say the sole contention of the defendant is that there was no authority in the act of the Legislature which authorized the city to issue drainage warrants, to issue them for more than $153,-

750.00, the value of the dredge boats, the derricks and other property having a physical existence, and that the entire balance of said issue of the $300,000 issued for the plant, franchise, to pay claims for damages, etc., and the $20,000 issued in compromise and satisfaction of drainage taxes collected by the defendant and diverted from the trust fund, is absolutely null, and especially those issued in satisfaction of the claim for damages and franchise rights, because there was no appraisement of the property or rights for which they were issued, and hence all except said $153,750.00 issued under said bill of sale are void. There are many answers to this contention, and among them the following, viz:

"First.—This same argument was made without avail in this Honorable Court when the case was here on *certiorari* before, to which the Court responded as follows:

"These warrants were to be issued not only in payment of the drainage plant, but in settlement of Van Norden's claims against the city for damages connected with the failure of the city to carry out the contract with the Canal Company, and Van Norden, which, in view of the fact that the drainage plant had been purchased by him for $50,000.00 may be assumed to have been the greater part of the consideration." New Orleans vs. Warner, 175 U. S., p. 144.

And here it is to be noted that such a claim was specially provided for in the 6th section of Act 30 of 1871, which declared as follows:

> "That the Board of Administrators shall be required, and it is hereby made their duty, immediately after the passage of this act, to locate the lines of the canals and protection levees specified in the various sections of this act in time to prevent delay in the prosecution of the work of said company, * * * and should the City Council fail to locate the lines of said canals and protection levees above specified, the City of New Orleans is hereby made liable to said company for the damages resulting from such delay."

The Court further said:

> "It is scarcely necessary to say the fact that the city chose to pay $300,000, in 1876, for the property which Van Norden bought, in 1872, from the Ship Canal Com-

pany for $50,000, is not one which can be considered here. The act of 1876 authorizing the purchase and settlement of claims against the city, provided for the appointment of an appraiser to estimate the value of the rights and things to be purchased or settled for. This appraiser was appointed, and appraised the dredge boats and machinery at $153,750, being twenty-five per cent. less than the original cost. He announced himself unable to come to a conclusion with reference to the damages claimed. It must be borne in mind that the consideration of $300,000 was fixed upon not only to cover the value of the property of the plant, but the exclusive franchise under the act of 1871, and the claims for damages against the city." Warner vs. New Orleans, 175 U. S., p. 145.

Second.—But suppose we are still mistaken, then we say the City of New Orleans, as against the present holders (third parties), is estopped to deny any regularity or want of consideration in the issue of said warrants beyond the $153,750 admitted to be valid and binding, because all of said warrants are in the precise form provided by the statute. They were issued and signed by the officers designated in said statute, and they recite on their face that they were issued in accordance with the provisions of Act No. 30 of the General Assembly of the State of Louisiana, held in the year 1871, etc., thus complying with said Act No. 16 of 1876, which provided that they should be issued in the same form and manner as those heretofore issued under said Act 30 of 1871 for work done. Bearing such recitation on their face, and there being no pretence of want of legislative authority to the city to make the compromise for which any and all of the warrants were given, they are valid in the hands of the present owners.

And especially so, because, neither in the appointment of the appraiser nor in the assignment of his duties and powers (as we will show hereafter) had the Canal Company nor Van Norden any voice whatever. In fact the pretended complaint of the city now is that she failed to do her duty in the mode of arriving at the result concluded in the act of sale and compromise pursuant to which the drainage warrants were issued, and hence

because of her own, now for the first time alleged direliction of duty, she must not pay for what she then received, but must retain all benefits, that by her own faults, she acquired. This she cannot do.

Third.—But suppose we are still mistaken, and that the city now has, as against a third holder and owner for value, the right to inquire, after a lapse of twenty-four years from the time of receiving the property transferrred, and without restoring the *statu quo,* and in fact without being able to do so, whether all the details which should have been observed by the city had been so observed, to ascertain what warrants were valid, then we say such inquiry will utterly fail to avail the city in the defence of this case.

The contention is that as there was no appraisement beyond the dredge boats, etc., the warrants issued beyond the value reported by the appraiser are null, but the law in reference to said appraisement will not support the contention. The clause in question is the 2nd section of said act of 24th February, 1876, which reads thus:

> "That should it be deemed advisable by the said Council to make said purchase and settlement, it shall be the duty of said Council of the City of New Orleans to provide, by ordinance, for the appointment of appraisers to estimate the value of the rights and things to be purchased or settled for, and the duties and powers of said appraisers shall be specifically assigned in said ordinance."

Clearly this law does not provide, nor does it mean, that the only sum to be paid, is to be the sum or amount found by the appraisers. Such a construction would nullify the entire purpose of the act, and would be destructive of the purpose of the act itself, which was to authorize the city to transact (compromise) and contract for the rights, franchise, claims, etc., of the Canal Company and Van Norden. This is made very clear by the last part of said section which declares, "the duties and powers of said appraisers shall be specifically assigned in said ordinance," showing he was entirely subject to the direction of the Council.

In other words, the appraisement was not to fix the price, but to assist the Council, by the appraisement, to arrive at a proper price to be paid. In other words, this provision was directory, and not imperative. See Endlich on the Interpretation of Statutes, Section 436, 437 and 433, 21 Mass., p. 67.

Such was the view of the Council on the subject, for the authority of and the instruction to the appraiser is thus given in Ordinance No. 3,479, found on page 104 of Record No. 640, October Term, 1898; No. 172, October Term, 1899.

> "Be it ordained, That in accordance with the provisions of Act No. 16, approved February 24, 1876, Thomas S. Hardie, city surveyor, be and he is hereby authorized and instructed to make a thorough examination of the condition and value of all the dredge boats, machinery, tools and appurtenances belonging to the Mississippi and Mexican Gulf Ship Canal Company, or transferee, and used for the excavating of canals or building protection levees, making a report to the committee of the whole, together with a statement of all information in the possession of his office, concerning damages claimed by said Mississippi and Mexican Gulf Ship Canal Company, or the transferee thereof."

He was authorized and instructed to make examination of the condition and value of the dredge boats, machinery, etc., and to make report to the committee of the whole, together with a statement of all information in his office (city surveyor), concerning the damages claimed, and for what purpose? To the end that the matter of the price and value of the things to be setttled and paid for might be properly discussed by the committee of the whole Council with said company and its transferee, and a price arrived at, and even after said committee had been informed as to the value, still it was entirely discretionary whether said amount should be paid. His report is full, and was considered by the commmittee of the whole Council before it a ted.

The above ordinance does not provide for a report on the value of the contract or franchise of the company and its trans-

feree, for that was a matter in which the services of an appraiser were unnecessary.

The contract was fixed by Act 30, of 1871, of the Legislature of the State, and from its inception to the time of the execution of the bill of sale, had been carried on under the supervision of the city herself, and she, by her Council or committee of the whole, knew more about its value or what should be paid for it than any appraiser could furnish.

And surely it was not necessary to have an appraisement of the $24,000 cash, collected by the city, diverted from the fund from which it belonged, and applied to general fund purposes, to fix its value, for it was cash. Perhaps the only surprising thing about this is, that Van Norden should consent to compromise such a claim for drainage warrants, but this is fully explained by a reference to Section 3 of said act which provided, as heretofore shown, that all sums agreed upon should be paid in drainage warrants. In other words, it was to take this form of payment, or not compromise at all.

Surely there can be no doubt that among the rights which belonged to the Canal Company (and its transferee after the transfer to him by said company) was the right to have all drainage tax collections placed to the credit of said company and said transferee, as a trust fund to be used solely for the purpose of drainage. This was expressly declared by Section 9, of said Act No. 30, of 1871, which after providing for the transfer of all assesssments, money, property and judgments from the former drainage commissioners to the Board of Administrators of the city and the imposition of further assessments where none had yet been levied, provided in the latter part of said section:

> "That all money or moneys received by the said Board of Administrators from said commissioners of the drainage districts, either from the sale of property received from said commmisssioners, from the collection of drainage assessments, and from any of the sources of revenue contemplated by the provisions of this section of this act, be placed to the credit of the Mississippi and Mexican Ship Canal Company, and held as a fund to be applied only to the

drainage of New Orleans and Carrollton, in accordance with the provisions of this act."

The uncontradicted evidence shows, that with this legal obligation on the city, she had collected the above $24,000 of drainage taxes which she had not deposited as required by said obligation, but had appropriated it to the general use of the city (See page 52, of the Present Record, which shows warrrants No. 393 to 404, inclusive, issued in satisfaction of the sum so misappropriated). In fact the evidence in the case shows the sum actually received by the city was $26,727.90. See suit of Commissioners of New Orleans Park vs. The City of New Orleans, pages 230 to 238 and especially page 238 Supreme Court Record No. 640, October term, 1898, and No. 172 of 1899. Deposition of Rabouin, same record, p. 314. Deposition of Butler, same record, p. 317.

IV.

It is very clear from the whole case, from the act of the Legislature authorizing the city to transact (compromise) and contract with the Canal Company and Van Norden, from the acts of the parties themselves as crystalized in the bill of sale of June 7, 1876, that there was not only a purchase of the physical property of the company and its transferee, but also a compromise and settlement of all the claims between the parties. Such a transaction, under the laws of Louisiana, has the force and effect of *res adjudicata* (Civil Code, Articles 3071, 3075). In speaking on this subject the Supreme Court of the United States in Oglesby vs. Attrill, 105 U. S. R., page 611, said:

> "The compromise stands, therefore, as a judgment, making a settlement of the very matters now set up as grounds of complaint in the petition on reconvention; that is, 'the frauds and machinations of the officers of the company' in levying the assessments. It settled all claims arising from the assessment, and the alleged fraudulent purposes of the officers in connection with it. Though made directly with the company, and the defendant, it protests from further suit those who advised, equally with those who levied, the assessment; participants in whatever

wrong was committen, if any there were, as well as principles; abettors as well as doers of it. No allegations of fraud, in addition to those made at the setttlement, can prevent the compromise from having effect as a judgment thereon. It may, indeed, by a direct proceeding instituted for that purpose, be rescinded for fraud, but it cannot, any more than any other judgment, be attacked collaterally. *Adler vs. Prudholme*, 16 La. Ann., 343."

We think the decree complained of is clearly right, that it is based squarely upon the matters already decided in this case, and that the writ prayed for should be denied with costs; and thus believing, we will conclude, with a substitution of names only, in the language of this Honorable Court, in Gaines vs. New Orleans, 6 Wall, 718. "Can we not indulge the hope that the rights of 'drainage warrant holders' will now be recognized?"

Respectfully submitted,

RICHARD DEGRAY,
J. D. ROUSE,
WILLIAM GRANT,
Solicitors for Appellees.